9-0900-10192-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HEALTH

In the Matter of Frana & Sons, Inc. Administrative Penalty Order Dated September 19, 1995.	ORDER GRANTING DEPARTMENT'S MOTION FOR SUMMARY DISPOSITION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

The above-captioned matter is pending before Administrative Law Judge Phyllis A. Reha pursuant to a Notice of and Order for Expedited Administrative Hearing issued by Patricia A. Bloomgren, Director of the Division of Environmental Health for the Minnesota Department of Health ("the Department") on November 14, 1995. On January 18, 1996, Frana & Sons, Inc. ("Frana" or "Respondent") filed a motion for summary judgment. The Department filed its motion for summary judgment on January 18, 1996. The record on these cross motions closed on January 29, 1996, with the receipt of the final reply brief.

Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, filed the motion on behalf of the Department. William D. Hull., Coleman, Hull & van Vliet, 8500 Normandale Lake Boulevard, Suite 2110, Minneapolis, Minnesota 55437, filed the motion on behalf of Respondent.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED as follows:

(1) The Department's Motion for Summary Disposition is GRANTED.

(2) Respondent's Motion for Summary Judgment is DENIED.

Dated this _1st_ day of March, 1996.

/s/
PHYLLIS A. REHA
Administrative Law Judge

NOTICE

This Report is a Recommendation, not a final decision. Pursuant to Minn. Stat. § 144.991, subd. 5(e), the Commissioner must wait five (5) days before issuing a final

decision in this matter. Should the affected party wish to submit comments to the Commissioner, those comments should be directed to Commissioner Anne M. Barry, 925 Delaware Street S.E., Minneapolis, Minnesota 55459-0040.

MEMORANDUM

Both parties assert that no facts remain for hearing in this matter. Respondent is a contractor who performs demolition work. Respondent is not a licensed asbestos abatement contractor. Asbestos was present at a job site, previously the Trimont Community Hospital, where Respondent was performing demolition work. A functioning medical clinic was in operation in a portion of the building adjacent to the work site. The asbestos was being removed from parts of the work site by a licensed asbestos abatement contractor. One area, the X-ray room, was not abated to allow the clinic to continue to use the X-ray equipment.

Prior to September 16, 1993, the X-ray equipment was removed in order for the asbestos abatement to be performed. Respondent conducted the demolition of the X-ray room prior to the asbestos abatement being performed. The demolition took approximately three hours. No barriers were erected to prevent migration of asbestos into occupied areas; no protective equipment was worn by the employees conducting the demolition; no air quality testing was performed during the removal; and, no standards for asbestos disposal were followed during the demolition.

On September 16, 1993, a representative of the asbestos monitoring contractor contacted the hospital and inquired into the status of the X-ray room. On being told the demolition had been performed, the representative investigated on September 21 and found bulk material containing between 2-5% asbestos, and dust containing traces of asbestos, loose in the X-ray room. The representative sealed the doors and asbestos abatement was then performed. The clinic was operating on the day the representative investigated. The asbestos in the samples exceeded the standard requiring abatement by a licensed asbestos abatement contractor under the standards established by rule. See Minn. Rules 4620.3500, subp. 4. The representative reported the findings to the Department. After the asbestos abatement contractor finished in the X-ray room, the site met the standard for environmental asbestos.

The Department investigated and concluded that violations of Minn. Stat. § 326.72, subd. 1; Minn. Rule 4620.3400; and Minn. Rule 4620.3500 had occurred. A Penalty Calculation Forum (Forum) was convened and considered the violations. The Forum concluded that the nine penalties are serious, not repeated, and not forgivable. The Forum calculated the base penalty as $15,000 determined by a penalty matrix. The Forum concluded three separate violations occurred, each constituting a severe deviation from compliance and a severe potential for harm. The base penalty assigned to each violation was the minimum amount ($5,000) in the most severe category of the matrix.

The Forum then considered what adjustments should be applied to the base penalty. The Forum considered increasing the penalty for repeated violations and concluded that no increase was appropriate. The factors of willfulness, history of past violations, number of violations, economic benefit, and other factors as justice may require, were considered as to whether the base penalty should be adjusted. The Forum concluded that no factors existed to warrant any adjustment to the base penalty. The Forum then reduced the penalty to $10,000 by operation of Minn. Stat. § 326.78, subd. 9(a) and (b), which sets the limit for a single violation at $10,000. The Department issued to Respondent a nonforgiveable Administrative Penalty Order of $10,000, dated September 19, 1995. This appeal followed.

Both parties have moved for summary judgment in this matter. Summary disposition is the administrative equivalent to summary judgment. Minn. Rules pt. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. Rules pt. 1400.6600.

It is well established that, it order to successfully resist a motion for summary judgment, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. Id.

Respondent argues that the penalty is excessive because the adjustment factors are all either neutral or favorable to Respondent. Respondent objected to the determination that the violations were serious without a determination of the specific damage caused to humans, animals, air, water, land, or other natural resources. The actions taken by the Department in setting the penalty amount are characterized by the Respondent as an "abuse of discretion."

There is no dispute that asbestos fibers can become airborne when disturbed. Likewise, there is no dispute that if those fibers are inhaled, they can cause health problems. For these reasons, asbestos removal is restricted to licensed asbestos abatement contractors; the area must be isolated from occupied areas of a building;

abatement workers must wear protective clothing; air sampling outside the isolated area must be performed to ensure that asbestos does not escape; and, strict rules for removal and disposal must be followed. See, Minn. Rules 4620.3500, subp. 4.

Appellant cites the other adjustment factors as warranting a downward adjustment of the penalty. The factors of willfulness, history of past violations, and number of violations were considered in favor of Appellant. The Department points out that Appellant is not a licensed abatement contractor and therefore, there should be no history of violations or number of violations. Willfulness is a factor decided in favor of Appellant, but that alone does not warrant a reduction in classification of the violation or mitigation of the penalty.

Regarding economic benefit, the Department argues that the statute means only that any economic gains, not economic losses can be considered in adjusting the penalty. The Department points out that costs of asbestos abatement are costs that are already required, and therefore cannot be claimed as appropriate reductions in penalty. Appellant claims its legal fees incurred in defending this matter are economic losses suffered. Appellant has not identified what abatement and disposal costs were not incurred when the asbestos was removed. See, Department's Memorandum in Opposition, at 4. The Forum concluded that there was no economic benefit to Appellant and there is insufficient evidence in the record to modify that recommendation. Likewise, there is no evidence to suggest that the Forum erred in not recommending a higher penalty. The Forum's consideration of economic factors does not raise a genuine issue of material fact and does not justify a modification of the penalty assessed.

Appellant has not identified any other factors as justice may require upon which to reduce the penalty. There is a suggestion that, since the removal only took three hours, $10,000 is an excessive penalty. This argument ignores the fact that the disturbed asbestos was unabated for at least five days, while workers, clinic employees, and others were exposed to the asbestos hazard. The Forum considered whether the base penalty should be adjusted. The Forum concluded that no factors existed to warrant any adjustment to the base penalty. There is no genuine issue of material fact that suggests the Forum's recommendation was in error or an abuse of discretion.

The Department followed the proper procedure in arriving at a nonforgivable penalty of $10,000 for the violation engaged in by Appellant. Although Appellant's asbestos abatement activities took only 3 hours, those activities were seriously lacking in protections, thereby creating a significant potential for harm. The total lack of protection for Appellant's own workers, and anyone else in the vicinity of the project area, for a period of at least five days, justifies the classification of the violation as "serious" on the penalty matrix. Since the harm suffered by exposure to asbestos is not immediately apparent, requiring the Department to establish harm would defeat the purpose of the legislation prohibiting improper abatement. The violation in this matter was not repeated, but the level of deviation from compliance makes the violation serious. Therefore, the penalty has properly been determined to be nonforgivable. No factors have been identified by the Respondent to indicate the penalty assessment is

unreasonable. Since there is no genuine issue of fact to be determined at hearing, summary disposition is appropriate. The Department is entitled to resolution of this matter in its favor, and its motion for summary disposition is GRANTED. The Appellant's motion for summary disposition is DENIED.

P.A.R.